Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JULIA MILLION,

Petitioner,

v.

NICK VINCENT SALAS AND
ANTHONY MICHELLE SLAYDEN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Bankruptcy Rules' provision that no appeal to a district court is allowed if not filed within a prescribed period of time, even when no notice of the commencement of that time-period is given to the appealing party, constitutes a denial of due process and a violation of Article III of the United States Constitution?

Whether the court of appeals abused its discretion in refusing to decide the constitutional question presented to it?

PARTIES AND RULE 29.6 STATEMENT

All parties are named in the caption of the case. SUP. CT. R 14.1(b).

No corporation or other business entity is involved in this case. SUP. CT. R 29.6.

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PETITION FOR WRIT OF CERTIORARI

Julia Million respectfully petitions this Honorable Court for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JURISDICTION

The court of appeals' judgment is undated, but bears a "filed" mark dated December 21, 1998.

No order concerning rehearing was rendered by the court of appeals, nor has any order concerning an extension to file this Petition been rendered by this Court.

There is no reliance on Supreme Court Rule 12.5.

The Supreme Court of the United States has jurisdiction to entertain this petition and to grant the relief requested, pursuant to 28 U.S.C.S. § 1254(1) (1988).

This case calls into question the constitutionality of certain Federal Rules of Bankruptcy Procedure, which are not specifically an Act of Congress. However, we recognize that 28 U.S.C.S. § 2403(a)(1990) may apply. No lower court has, to Petitioner's knowledge, certified to the Attorney General that the constitutionality of an Act of Congress was drawn into question. SUP. CT. R. 29.4(b).

CONSTITUTIONAL AND RULES PROVISIONS

UNITED STATES CONSTITUTION:

> No person shall be ...deprived of life, liberty, or property, without due process of law... .

U.S. CONST. amend. V.

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. III § 1.

FEDERAL RULES OF BANKRUPTCY PROCEDURE:

Rule 8002. Time for Filing Notice of Appeal

(a) Ten-day period

The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

BANKR. R. 8002(a)

Rule 9022. Notice of Judgment or Order

(a) Judgment or order of bankruptcy judge

Immediately on the entry of a judgment or order the clerk shall serve a notice of the entry by mail

> in the manner provided by Rule 7005 on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of the judgment or order. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

BANK. R. 9022(a).

STATEMENT OF THE CASE

Proceedings Below

Julia Million filed a voluntary petition under Chapter 13 of the United States Bankruptcy Code. After she dismissed her petition, the bankruptcy court purported to award an interest in Million's homestead to Salas and Slayden (hereafter, "Salas") by Judgment entered June 18, 1997 (Appendix B).

Million received no notice of the entry of the Judgment until July 1, 1997, on which date she filed her Notice of Appeal to the United States District Court. The Bankruptcy Clerk had previously stated that no Judgment had been entered, in response to inquiry by Million. Salas moved for, and the District Court granted dismissal of the appeal for want of jurisdiction.

The court of appeals affirmed, reaching only one of the

issues presented, and refusing to consider the constitutional issue as having not been raised in the district court.

Statement of Facts

Julia Million filed a voluntary petition in the United States Bankruptcy Court for the Northern District of Texas. In doing so, she claimed her home as exempt property under the Texas Property Code § 41.001. See, TEX. CONST. art. XVI, § 50. Her sons ("Salas") filed claims against her and objected to her claimed exemptions. Million objected to Salas' claims.

An evidentiary hearing was conducted on the claims and objections. Subsequently, Million moved for dismissal of her bankruptcy action, which motion was granted by the bankruptcy court on April 14, 1997. Later, the bankruptcy court signed a Judgment on the claims and objections. Million sought vacation of the bankruptcy court's Judgment, in light of the order of dismissal.

On May 28, 1997, the bankruptcy judge dictated by phone his rulings on the motion to vacate. The parties attempted to prepare a proposed Judgment consistent with what the bankruptcy judge had dictated. Million signed a proposed order "as to form" and delivered it to Salas' counsel. At that time, it was unknown by what manner Salas' counsel would present that proposed order to the court, whether by direct presentation to the bankruptcy judge or by delivery to the United States Bankruptcy Clerk for forwarding to the judge. It was also unknown whether the bankruptcy judge would sign the form of Judgment prepared by counsel. Salas' counsel presented the proposed Judgment directly to the judge and he signed it. The Judgment dismissed the case again, but purported to grant Salas an interest in Million's homestead.

Million received no further word from either the Court or Salas' counsel regarding the entry of the Judgment. Million began checking with the Clerk of the bankruptcy court regarding the proposed Judgment. As late as July 1, 1997, the Bankruptcy Clerk reported that no judgment had been entered. Million then checked with Salas' counsel to determine whether the proposed Judgment had been presented to the court, and learned on July 1, 1997, for the first time, that the Judgment had been entered on June 18, 1997.

Upon learning of the entry of the Judgment, Million immediately filed her Notice of Appeal to the United States District Court. Salas' filed their Motion to Dismiss the Appeal, which was granted by the district court on November 17, 1997, after both parties had fully briefed the merits of the appeal.

On December 21, 1998, the court of appeals affirmed the district court's dismissal, without reaching most of the issues presented. (Appendix E).

REASONS FOR GRANTING THE WRIT

QUESTION ONE: Whether the Bankruptcy Rules' provision that no appeal to a district court is allowed if not filed within a prescribed period of time, even when no notice of the commencement of that time-period is given to the appealing party, constitutes a denial of due process and a violation of Article III of the United States Constitution?

While this question has not been passed upon by this Court in the specific context of lack of actual notice under the Bankruptcy Rules, the doctrine of requiring actual notice is well established in the jurisprudence of this Court as an essential component of due process.

The Federal Bankruptcy Rules of Procedure fail to provide for actual notice of commencement of the 10-day period in which a party may request review by an Article III judge, or lacks any provision that any requirement for notice be actually observed. In this context, the Rules [1] constitute violations of the Due Process Clause of the United States Constitution, Amendment Article V, and of Article III.

Lack of Notice is Denial of Due Process

The Fifth Amendment provides, "No person shall be ...deprived of life, liberty, or property, without due process of law... ." U.S. CONST. amend. V. Million has a property interest

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[1] "Rule" and "Rules" shall mean the Federal Bankruptcy Rules of Procedure, unless otherwise indicated.

in her homestead. She also has a property interest in her appeal, which she has been prevented from presenting to an Article III judge because of a lack of notice that constitutes a denial of due process to her. U.S. CONST. amend. V; ***Tulsa Professional Collection Services v. Pope,*** 485 U.S. 478, 485 & 489, 99 L. Ed.2d 565, 575 & 577, 108 S.Ct.1340 (1988); U.S. CONST. art. III; ***Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,*** 458 U.S. 50, 73 L. Ed. 2d 598, 102 S.Ct. 2858 (1982).

Although the Rules *nominally* provide for notice, Rule 9022(a) appears to go out of its way to provide no incentive, and quite some disincentive, to the *actual* provision of such notice. ***Id.*** The same part of the Rule which requires service of notice by the clerk, and which requires that the fact of such service be noted in the docket, goes on to specify that the failure of the court clerk to comply with the Rule will not affect the time in which an aggrieved party has to appeal. ***Id.*** Nowhere in the Rules is the prevailing party required — less yet encouraged — to notify or provide a copy to any other party or counsel. Under the structure of the Rules, the 10-day period of time in which a party has to seek review by an Article III judge may pass without a party having any notice that the time period has commenced. [2]

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[2] The district court suggested Million should have filed a motion for extension of time to file notice of appeal, notwithstanding lack of timely actual notice, and that actual notice was not required because she had a duty to keep herself apprised of the status of her case. The district court was wrong on both counts. In order for her to file an extension, she had to admit she was negligent, but claim it was excusable neglect. BANK. R. 8002(c). She was not negligent, because she was entitled to receive actual notice of the entry of the court's order. *City of New York v. New York, New Haven,* 344 U.S. 293, 97 L. Ed. 333, 73 S.Ct. 299 (1953). Similarly, although a party *should* keep

Notice as a Component of Due Process

There is a long history of the concept of notice appropriate under the circumstances as a component of due process. In ***Baldwin v. Hale***, 68 U.S. (1 Wall.) 223, 17 L. Ed. 531 (1863), the Court stated:

> Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense.

Id., at 233, 17 L. Ed., at 534.

In ***Roller v. Holly***, 176 U.S. 398, 44 L. Ed. 520, 20 S.Ct. 410 (1900), the Court indicated that the Constitution requires notice that might vary from circumstance to circumstance, but always requires notice which is reasonable and adequate for the particular circumstance at hand:

> That a man is entitled to some notice before he

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herself apprised of the status of her case, this Court has held that where the governing law mandates actual notice to a party, Rule 9022(a), the party is entitled to await such formal notice before making the required response. ***City of New York v. New York, New Haven, supra.*** See also, ***Mennonite Board of Missions v. Adams***, 462 U.S. 791, 799, 77 L. Ed.2d 180, 188, 103 S.Ct. 2706 (1983) ("[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation."); and, ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306, 320, 94 L. Ed. 865, 876, 70 S.Ct. 652 (1950) ("[I]t is too much in our day to suppose that ... any individual ... does or could examine all that is published to see if something ... affects his property interests.")

> can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight.... It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose.

Id., at 409, 44 L. Ed., at 524, 20 S.Ct. 410.

The Court expounded on the concept of notice appropriate to the circumstances in ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306, 94 L. Ed. 865, 70 S.Ct. 652 (1950). That case involved a petition by the trust company for settlement of an account as common trustee for 113 trusts involving many beneficiaries, some of whose addresses were known and others whose addresses were not. *Id.*, at 309, 94 L. Ed., at 870-71, 70 S.Ct. 652. The trust company complied with New York banking law by giving statutory notice to the beneficiaries by publication in a local newspaper. *Id.*, at 309-310, 94 L. Ed., at 871, 70 S.Ct. 652. The Court held that the Due Process Clause requires "at a minimum" notice appropriate to the nature of the case. *Id.*, at 313, 94 L. Ed., at 873, 70 S.Ct. 652. The Court held that personal service of written notice would not be required, but that persons whose locations were known were entitled to better notice than mere publication. *Id.*, at 313-316, 94 L. Ed., at 873-875, 70 S.Ct. 652. The Court went on to state that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id., at 314, 94 L. Ed., at 873, 70 S.Ct. 652.

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected. . . .

Id., at 315, 94 L. Ed., at 874, 70 S.Ct. 652. With respect to the "real life" likelihood that publication would provide actual notice, the Court said:

> Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."

Id., at 320, 94 L. Ed., at 876, 70 S.Ct. 652.

In 1953, the Court directed its due process inquiry to lack of notice under the Bankruptcy Act, 47 Stat.1474, as amended 49 Stat. 911, 11 U.S.C. §205. ***City of New York v. New York, New Haven***, 344 U.S. 293, 97 L. Ed. 333, 73 S.Ct. 299 (1953). The bankruptcy judge provided that certain

creditors be notified by newspaper publication of the deadline in which to file their claims. ***Id.***, at 294, 97 L. Ed., at 335, 73 S.Ct. 299 (1953). The Court stated "We hold the publication of the bar order in newspapers could not be considered 'reasonable notice' to New York under the circumstances of this case." ***Id.***, at 296, 97 L. Ed., at 336, 73 S.Ct. 299 (1953). In response to the claim that the City of New York had actual knowledge that the reorganization was taking place in the bankruptcy court, the Court responded:

> The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory "reasonable notice" will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.
>
> The statutory command for notice embodies a basic principle of justice — that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights.

Id., at 297, 97 L. Ed., at 337, 73 S.Ct. 299 (1953).

In 1982, the Court dealt with the question of whether posting legal process to the door in eviction actions afforded adequate notice under the circumstances pursuant to the Due Process Clause. The Court said:

> Of course, the reasonableness of the notice provided must be tested with reference to the existence of "feasible and customary" alternatives and supplements to the form of notice chosen . . . .
>
> . . . . [T]he mails provide an "efficient and inexpensive means of communication" upon which prudent men will ordinarily rely in the conduct of important affairs. Notice by mail in the circumstances of this case would surely go a long way toward providing the constitutionally required assurance. . . . [W]here an inexpensive and efficient mechanism such as mail service is available to enhance the reliability of an otherwise unreliable notice procedure, the state's continued exclusive reliance on an ineffective means of service is not notice "reasonably calculated to reach those who could easily be informed by other means at hand".

Greene v. Lindsey, 456 U.S. 444, 454-456, 72 L. Ed. 249, 258-259, 102 S.Ct. 1874 (1982).

In 1988, the Court again dealt with the due process implications of lack of personal notice on claimants or potential claimants whose name and location were known. ***Tulsa Professional Collection Services v. Pope,*** 485 U.S. 478, 99 L. Ed. 2d. 565, 108 S.Ct. 1340 (1988). The Court followed ***Mullane's*** holding that there was no necessity to make "impractical and extended searches. . . in the name of due process," ***Mullane, supra,*** 339 U.S., at 319, 94 L. Ed., at 875, 70 S.Ct. 652, nor the need to give personal notice to those with mere "conjectural" claims, *id.*, at 317, 94 L. Ed., at 875, 70

S.Ct. 652. However, the Court did observe that:

> We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice.
>
> . . . [A] requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted.

Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 490, 99 L. Ed.2d. 565, 578, 108 S.Ct. 1340 (1988). The Court also held that "In assessing the propriety of actual notice in this context consideration should be given to the practicalities of the situation and the effect that requiring actual notice may have on important state interests." ***Id.***, at 489, 99 L. Ed.2d, at 578, 108 S.Ct. 1340. The Court noted, by way of example, that "[W]hile we have recognized that in the bankruptcy context there is a need for prompt administration of claims, we also have required actual notice in bankruptcy proceedings." ***Id.***, at 490-91, 99 L. Ed.2d, at 579, 108 S.Ct. 1340.

Thus, the Court has, over the past one hundred and thirty-five years, made it clear that notice is an indispensable element of due process; that the type of notice required depends upon the particular circumstances and the practicality and feasibility of such notice; that these provisions apply to bankruptcy actions; and that where a party in bankruptcy is entitled to notice, such notice is essential to comport with due process requirements, such that even if the aggrieved party knew or should have known of the court's action or possible action, the court would still be obligated to provide actual

notice.

The foregoing cases primarily review situations in which the applicable rule or statute makes no provision for constitutionally required actual notice. This may appear to leave unresolved the question of whether constitutional rights are implicated where the applicable rule or statute makes provision for notice, but actual notice is never received. However, this Court dealt with precisely that situation in ***City of New York v. New York, New Haven***, 344 U.S. 293, 97 L. Ed. 333, 73 S.Ct. 299 (1953). There, the Bankruptcy Act required reasonable notice of the deadline to file a claim to be provided to known creditors. ***Id.,*** at 296, 97 L. Ed., at 336, 73 S.Ct. 299. This Court held that the failure of the bankruptcy court to actually provide the constitutionally required notice constituted a denial of due process rights. ***Id.,*** at 296-97, 97 L. Ed., at 336-37, 73 S. Ct. 299.

Notice in Context of Denial of Fair Opportunity to Appeal

This Court has not dealt with the due process implications of lack of notice which denies a party a right to appeal. Two courts of appeals have held that the same due process concepts applicable to a cause of action in a court or administrative agency, are likewise applicable to appellate proceedings.

In 1986, the Second Circuit court of appeals was called upon to resolve a dispute in which an $11 billion judgment was entered against Texaco in a Texas district court. ***Texaco, Inc. v. Pennzoil Co.***, 784 F.2d 1133 (2nd Cir. 1986) *rev'd on other*

grounds, 481 U.S. 1, 95 L. Ed. 2d 1, 107 S.Ct. 1519 (1987).[3] Texas law provided that, in order to stay the enforcement of the judgment pending appeal, Texaco would have to post a bond of at least $11 billion. ***Id.***, at 1138 n. 4. Texaco initiated an action in the District Court for New York contending that, ***inter alia,*** the Texas requirement violated its due process rights. ***Id.***, at 1136-37. The Second Circuit held that "[D]ue process required that, once the state has created a right of appeal, it must 'offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal.'" ***Id.***, at 1154.

The Fifth Circuit held similarly in ***Chike v. INS***, 948 F.2d 961 (5th Cir. 1991). That court held that, although due process does not require that an opportunity to appeal be provided, if the right is provided, due process must accompany its steps. ***Id.***, at 962. There, Chike had initiated the appeal but, due to an internal error, there was a failure to provide him with notice of the briefing schedule. ***Id.***, at 961-62. Accordingly, Chike was unable to submit a brief for consideration. That court observed that "the full panoply of due process protections does not apply to deportation proceedings, but instead requires a showing of substantial prejudice.[4] ***Id.***, at 962. That court went

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[3] Although the effect of this Court's reversal was to set aside an injunction protecting Texaco's ability to proceed with its appeal without posting bond in the full amount, this Court's reasoning was based solely on grounds of abstention. It did not reach the constitutional question. *Id.*, at 18, 95 L. Ed. 2d, at 20, 107 S.Ct. 1519.

[4] Although it appears clear that the denial to Million of an opportunity to have the question of the loss of interest in her homestead heard by an Article III judge, without notice, constitutes substantial prejudice to her, substantial prejudice is not required in order to show that her constitutional right to due process has been violated. ***Dixon v. Love***, 431 U.S. 105, 115, 52 L. Ed.2d 171, 181-82, 97 S.Ct. 1723

on to hold that:

> Even under this more stringent due process standard, petitioner has shown that his constitutional rights were infringed. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and opportunity for hearing.'" The opportunity to be heard is a "root requirement" of due process.

Id. (Citations omitted).

The *Texaco* and *Chike* opinions together stand for the proposition that, once an appellate procedure has been established, it must provide a fair opportunity to obtain adjudication on the merits of that appeal, and that in order to do so, actual notice must be provided to the appellant in order for that to be accomplished. The failure of the bankruptcy court (or the adverse party) to advise Million that any order existed from which an appeal could be taken was surely as great a deprivation of notice and opportunity to be heard as the failure to provide Chike with a briefing schedule after he had initiated his appeal. *Chike v. INS*, 948 F.2d 961 (5th Cir. 1991).

"Notice" Given Only Lip Service in Rules

The Rules contain only nominal provisions for notice to a party that a judgment or order has been entered against that party. FED.R.BANKR.P. 9022(a). The Rules appear to go out of their way to specify that the failure of the clerk to provide

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(1977).

such notice will be no grounds for relief to the aggrieved party. *Id.* There is no incentive stated in the Rules to make certain that the clerk performs his or her duty. There is certainly no provision in the Rules providing any penalty to the clerk for failure to perform his or her obligation under 9022(a), and it goes without saying that the clerk would not be subject to any civil liability to the aggrieved party.

Furthermore, these Rules not only condone, but encourage, the prevailing party or its counsel to withhold notice of the judgment from the aggrieved party. In fact, it strongly encourages this practice, by rewarding the prevailing party with an unappealable judgment if he withholds notice for a mere 10 days. (In this case, notice was received on the 13th day.) These Rules create a system which has unconstitutionally deprived Million of notice that the clock was ticking on her right to appeal her case to an Article III judge.

This type of disincentive to provide actual notice was addressed by the Court in ***Tulsa Professional Services v. Pope***, 485 U.S. 478, 99 L. Ed.2d 565, 108 S.Ct. 1340 (1988).

> [T]he executor ... will often be ... a party with a beneficial interest in the estate. This could diminish an executor's ... inclination to call attention to the potential expiration of a creditor's claim. There is thus a substantial practical need for actual notice in this setting.

Id., at 485, 99 L. Ed.2d, at 578, 108 S.Ct. 1340. *See also, **Ornelas v. United States***, 517 U.S. 690, 699, 134 L. Ed.2d 911, 920, 116 S.Ct. 1657 (1996) (Court would not "eliminate the incentive" for parties to conduct themselves consistent with constitutional requirements.)

The Rules are full of provisions requiring opposing counsel to send notices to other interested parties. See, for example, Rules 1009(a), 1010, 3001(e)(5), 3007, 6007(a), 7005, and 8008(b). See also, Rules 2002 and 9007. Parties involved in bankruptcy proceedings are frequently called upon to mail as many as twenty or more notices to the other parties in a case. Rule 1007.2(b). N.D. TX L.B.R. See also, Rules 2002.1(a)(2), (3), (5), (10); (b); (c); (d); (1), (2), (4); (f); (g); 2016.1(a); 3002.1(a); and 4001.1(a) N.D. TX L.B.R.

The Illusion of Access to Article III Court

In 1982, the Court held that the Bankruptcy Act of 1978, Pub.L. 95-598, 92 Stat. 2549, unconstitutionally vested judicial power in bankruptcy judges who did not have the attributes of Article III judges. ***Northern Pipeline Construction v. Marathon Pipe Line Co.***, 458 U.S. 50, 73 L. Ed. 2d 598, 102 S.Ct. 2858 (1982). While Congress has some latitude in creating "adjunct" courts to make determinations involving congressionally created rights, it has less authority to do so when the underlying claim is based on state law. ***Id.***, at 81-84, 73 L. Ed. 2d, at 622-24, 102 S.Ct. 2858. The Court concluded that Congress has:

> impermissibly removed most, it not all, of the "essential attributes of the judicial power" from the Art III district court, and has vested those attributes in a non-Art III adjunct.

Id., at 87, 73 L. Ed. 2d, at 625, 102 S.Ct. 2858.

In 1989, the Court was called upon to consider the denial of a right to a jury trial to certain parties under the Bankruptcy Amendments and Federal Judgeship Act of 1984,

Pub.L. 98-353, 98 Stat. 333. ***Granfinanciera v. Nordberg,*** 492 U.S. 33, 106 L. Ed. 2d 26, 109 S.Ct. 2782 (1989). The Court held only that petitioners were entitled to a jury trial, reserving other issues for another day. ***Id.***, at 38 and 64 n.19, 106 L. Ed. 2d, at 38 & 55 n. 19, 109 S.Ct. 2782. In doing so, the Court considered the effect on the interests of speedy and efficient resolution of bankruptcy proceedings. However, it reaffirmed the position it had taken on numerous previous occasions:

> The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.

Id., at 63, 106 L. Ed. 2d, at 54-55, 109 S.Ct. 2782.

The Rules provide only the illusion of involvement by Article III judges in, and their supervision over, proceedings conducted by adjunct bankruptcy judges in the context of appellate review. The 10-day window between entry of any appealable order and the deadline to perfect appeal is only one-third that applicable to an appeal from a district court. *Compare* BANKR.R. 8002(a) *with* FED.R.APP.P.4(a)(1)(A). Mail delayed over the weekend is a *de minimus* inconvenience to the party appealing from a district court, but it cuts out one-third of the bankruptcy appellant's entire period in which to get her appeal perfected. Similarly, a one-week delay in the clerk's or opposing counsel's mailing of an appealable order may be a minor annoyance to the party headed to the court of appeals, but it may entirely eviscerate the appellate rights of the bankruptcy litigant headed to the district court. Her right to review by an Article III judge may evaporate into the thin air of law by the innocent delays of well-intentioned clerks, counsel, and postal employees.

The contrast between the illusion of involvement by Article III judges and reality is even more pronounced where notice is never received, in view of the fact that there is no real requirement that it ever be sent: there is no consequence to the clerk who fails to send it, and the "consequences" are all beneficial to opposing counsel who withholds it. For the protections of Article III to have any meaning in bankruptcy proceedings, the availability of review by an Article III judge must not be dependent upon prompt compliance by the clerk with their duties imposed by the Rules. This arrangement has removed "all" — not just "most" — "of the essential attributes of the judicial power from the Art. III district court," ***Northern Pipeline Construction v. Marathon Pipe Line Co.***, 458 U.S. 50, 87, 73 L. Ed. 2d 598, 625, 102 S.Ct. 2858 (1982), as to any party unlucky enough to have anything other than the most prompt and efficient of bankruptcy clerks or the most honorable of opposing counsel. Whatever advantage this substantial denial of rights has for the speed of bankruptcy proceedings, it cannot be countenanced where it fails to abide by constitutional safeguards. ***Granfinanciera v. Nordberg,*** 492 U.S. 33, 63, 106 L. Ed. 2d 26, 54-55, 109 S.Ct. 2782 (1989).

Actual notice to an aggrieved party prior to foreclosing that party's right to appeal to an Article III judge is required under the Due Process Clause, and it meets all the objectives and considerations which have been addressed by the Courts. Actual notice meets the practicality and feasibility requirements without question. Actual notice would also provide the requisite incentive to the bankruptcy clerk to see that its obligations under Rule 9022(a) are actually performed, because no file could be closed with confidence when the Clerk has failed to comply with the duty to provide notice. Providing a copy of an entered order to opposing counsel by the prevailing party, long practiced as a matter of professional courtesy,

should be encouraged — not discouraged — and would ensure the prevailing party that his order or judgment would only become final if notice were given to the other side.

This Court should hold the district court's order of dismissal, where there has been no notice provided to the aggrieved party prior to the deadline on which a Notice of Appeal would be due, is a violation of the United States Constitution Amendment Article V, in that the lack of notice constitutes a denial of due process, and violates Article III in unreasonably preventing a party from having her case heard by a United States district judge.

QUESTION TWO: Whether the court of appeals abused its discretion in refusing to decide the constitutional question presented to it?

Constitutional Issue Not Ripe Until Dismissal

The court of appeals held, in a footnote, that it would not take up "other arguments", including the constitutional question, because Million failed to present those to the district court (Fifth Circuit Opinion, Appendix F, n1.). However, the Constitution was not implicated until the district court dismissed the appeal and, thus, there was no reason to raise the issue in that court. *See, **Project B.A.S.I.C. v. O'Rourke***, 907 F.2d 1242, 1244 (1st Cir. 1990) (Opinion by Breyer, J.). For example, the City of New York's rights were finally determined against it, without notice, by the bankruptcy court's "final decree" in ***City of New York v. New York, New Haven***, 344 U.S. 293, 294, 97 L. Ed. 333, 335, 73 S.Ct. 299 (1953). It was solely by virtue of the court's reservation of jurisdiction to

consider future applications that permitted the City to raise the point in a corollary matter. *Id.*

The court of appeals improperly treated the constitutional issue as forfeited. Nonetheless, the remainder of this discussion will treat the issue as if it were one which was required to be raised in the district court.

No Evidence Presented — No Prejudice

In *Hormel v. Helvering*, 312 U.S. 552, 85 L. Ed. 1037, 61 S.Ct. 719 (1941), this Court stated the general rule and the reasons for it:

> Ordinarily, an appellate court does not give consideration to issues not raised below.... [P]arties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to *offer all the evidence* they believe relevant;...it is equally essential in order that litigants may be not be surprised on appeal by final decision there of issues upon which they have had no opportunity to *introduce evidence*.

Id., at 556, 85 L. Ed., at 1041, 61 S.Ct. 719 (emphasis provided).

This Court's reasons, on their face, show that they are applicable to evidentiary proceedings, but that they provide far less support for preventing review of errors in non-evidentiary proceedings, such as the motion to dismiss for want of jurisdiction in this case. Where the district court resolves a

motion without receiving any evidence, it must be presumed that the movant's motion is predicated on the assumption, for the purposes of its motion, that all facts adverse to it are true, but that it is nonetheless entitled to prevail on its motion. *See* ***Hospital Bldg. Co. v. Trustees of Rex Hospital***, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 345, 96 S.Ct. 1848 (1976); ***Haines v. Kerner***, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 654, 92 S.Ct. 594 (1972). In this case, the district court found that there was no fact question for it to decide, and Salas offered no evidence to bolster its motion. Thus, the reasoning behind the general rule is simply not applicable to the Salas' Motion to Dismiss appeal in the District Court.

"As Fundamental Justice May Require"

The Court also stated that:

> There may always be exceptional cases, or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court...below.

Hormel v. Helvering, 312 U.S. 552, 557, 85 L. Ed. 1037, 1041, 61 S.Ct. 719 (1941). The Court went on to say that:

> Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. .... Whether articulated or not, the philosophy underlying the exceptions to the general practice is...decisions not in accordance with law should be modified, reversed, or reversed and remanded "as justice may require".

Id., U.S., at 557-559, L. Ed., at 1041-42, 61 S.Ct. 719.

Court of Appeals' "Plain Error" Standard

Following the lead of this Court, ***Thomas v. Arn***, 474 U.S. 140, 88 L.Ed 2d 435, 106 S.Ct. 466 (1985) and ***United States v. Olano***, 507 U.S. 725, 123 L. Ed.2d 508, 113 S.Ct. 1770 (1993), the Fifth Circuit adopted a new standard for determining an issue of law raised for the first time on appeal in a civil case. ***Douglass v. United Services Automobile Assoc.***, 79 F.3d. 1415 (5th Cir. 1996) (*en banc*). *See also*, ***Crawford v. Falcon Drilling Co., Inc.***, 131 F.3d 1120 (5th Cir. 1997). The court of appeals then engaged in a four-part analysis:

> [W]e must determine (1) if there was error, (2) if that error was plain, (3) if the error affects substantial rights, and (4) whether allowing that error to stand seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Crawford v. Falcon Drilling Co., Inc., 131 F.3d 1120, 1124 (5th Cir. 1997). The case at bar meets the four-part test under the Fifth Circuit's analysis; however, the Fifth Circuit never undertook to apply any of that analysis, as will be discussed below.

The first prong requires the presence of error. The argument supporting Question One, above, shows that this Court has held that actual notice, practical under the circumstances, is an essential requirement of due process. The denial of Million's right to be heard by an Article III judge, without notice to her, constitutes error. The second element is satisfied, as well. The error was plain in the sense that the

decisions of this Court were consistent and unbroken as to the requirement of actual notice as an essential component of due process. *See,* ***Turner v. City of Memphis***, 369 U.S. 350, 353, 7 L. Ed. 2d 762, 765, 82 S.Ct. 805 (1962).

The third prong is that the error affects substantial rights. The Fifth Circuit's analysis equates substantial rights with a prejudicial error that affects the outcome of the proceeding. ***Crawford v. Falcon Drilling Co., Inc.***, 131 F.3d 1120, 1125 (5th Cir. 1997). Elsewhere, it treats that prong as an error that materially prejudices a party's case, without a requirement that reconsideration without the error would produce a different result. ***Id.***, at 1127-28. Under either approach to the third prong of the plain error test, though, this case would pass that test. The dismissal of the case without actual notice to Million of commencement of the 10-day time period is an error which certainly affects her substantial rights, and it would certainly affect the outcome of the motion to dismiss the appeal for want of jurisdiction. Whether it would eventually alter the outcome of the appeal on the merits, could not be predicted with certainty, just as in ***Crawford v. Falcon Drilling,*** 131 F.3d 1120, 1127-28 (5th Cir. 1997). Million's substantive rights have just as surely been affected by the lower court's error with regard to the constitutional issue involved. *See,* ***Turner v. City of Memphis***, 369 U.S. 350, 353, 7 L. Ed. 2d 762, 765, 82 S.Ct. 805 (1962).

The fourth prong involves the question of whether allowing the lower courts' errors to stand seriously affects the fairness, integrity or public reputation of judicial proceedings. The Fifth Circuit has held that there was a strong procedural similarity between ***Falcon Drilling*** and ***Hormel v. Helvering***, 312 U.S. 552, 85 L. Ed. 1037, 61 S.Ct. 719 (1941), such that the fourth prong should be considered met. It is just as true that

the procedural setting of this case is substantially similar to that in ***Turner v. City of Memphis,*** where the unconstitutionality of the underlying statute, rule or regulation "is clear under prior decisions and the undisputed facts of the case." ***Turner v. City of Memphis,*** 369 U.S. 350, 353, 7 L. Ed. 2d 762, 765, 82 S.Ct. 805 (1962).

In addition, the ***Falcon*** court noted the minimal use of judicial resources if the error were considered and sustained:

> [F]urthermore, our discretion is informed by the fact this case is tried to the court...[T]he "public concern" for finality is based on the need to conserve limited judicial resources. In this case, acknowledging the presence of plain error and remanding the case for further proceedings will not unnecessarily burden our federal courts' tremendous caseload. A situation which would require repeating a lengthy jury trial might present a different case.

Crawford v. Falcon Drilling Co., Inc., 131 F.3d 1120, 1129 (5th Cir. 1997). The identical reasons are present here. No jury is available or appropriate on an appeal from bankruptcy court to a district court. The appellate briefs have been filed with the district court, and all that it is required is a determination of the merits of the appeal.

Court of Appeals' Capricious Handling

Notwithstanding the court of appeals' *en banc* decision in ***Douglass v. United States Automobile Assoc.***, *supra*, as refined in ***Crawford v. Falcon Drilling Co.***, *supra*, establishing a "plain error" standard of review of "unperfected" error, the

court of appeals did not apply that standard in refusing to take up Million's constitutional argument. It merely said that it was "confident that no miscarriage of justice will result" (Appendix F, at n1), citing ***Lindsey v. FDIC***, 960 F.2d 567, 572 (5th Cir. 1992). Even under the discarded ***Lindsey*** standard, however, the Court should have taken up Million's constitutional argument.

The discarded standard set forth in ***Lindsey,*** and the cases cited therein, holds that the Fifth Circuit "will not address an issue raised for the first time on appeal unless it is a purely legal issue and our refusal to consider it would result in a miscarriage of justice." ***Id.***, at 572. The constitutional issue of whether lack of actual notice can deny a party a right to appeal from a bankruptcy judge to an Article III judge is a purely legal one. (*Supra*, at 7-22). The remaining prong of that standard is that the refusal to consider the point would result in "miscarriage of justice". ***Id.***

The court of appeals discussed "manifest injustice" (arguably the same standard as "miscarriage of justice") in ***Douglass v. United States Automobile Assoc.***, 79 F.3d 1415, 1423-28 (5th Cir. 1996), holding that "manifest injustice" is a far more elusive concept than that of plain error. ***Id.,*** at 1424. However, the Fifth Circuit has applied the "manifest injustice" standard to allow it to consider points not raised below.

In ***Evans v. Triple R Welding & Oil Field Maintenance Corp.***, 472 F.2d 713 (5th Cir. 1973), the court of appeals found that the appellants had changed their legal theory, and that they were entitled to indemnity under the express provisions of their contract, but not under their previous theory of implied warranty. The court of appeals found that a miscarriage of justice would result if the court were not to take up the new

argument and grant judgment for appellants for indemnity under the express provisions of the contract. *Id.*, at 716.

In *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983), the court of appeals held that its failure to consider a constitutional argument concerning "petitioning immunity" presented a colorable argument that the court's refusal to consider that point would be unfair. *Id.*, at 1364. The court of appeals took up that argument, considered it, and held it to be without merit.

And, in *North Mississippi Communications, Inc. v. Jones*, 874 F.2d 1064 (5th Cir. 1989), the court of appeals had to consider whether a miscarriage of justice would result if it did not consider the burden shifting argument in a First Amendment case. *Id.*, at 1068-70. There, the court of appeals analyzed the facts of the case and came to the conclusion that its failure to take up the matter would result in a miscarriage of justice, while at the same time declining to predict what the ultimate outcome of the case would or should be. *Id.*, at 1069-70.

Although this Court granted discretion to the courts of appeals to determine the circumstances under which it would review unperfected error, *Singleton v. Wulff*, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 837, 96 S.Ct. 2868 (1976), it cannot seriously be argued that the courts of appeals were granted authority to apply their standard arbitrarily, capriciously, or not at all. *See, Johnson v. United States*, 520 U.S. 461, 469-70, 137 L. Ed. 2d 718, 728-29, 117 S.Ct. 1544 (1997). In this case, the court of appeals not only arbitrarily and capriciously failed to apply the standard it had adopted several years earlier, but reached back to a discarded standard, and then failed to apply it in a consistent manner. This amounts to an abuse of discretion by the court of appeals, and adversely reflects upon the fairness,

integrity, or public reputation of judicial proceedings. ***United States v. Olano***, 507 U.S. 725, 123 L. Ed.2d 508, 113 S.Ct. 1770 (1993).

CONCLUSION

FOR THESE REASONS, this Court should grant the Petition for Certiorari. Petitioner, Julia Million, prays the Court take up the constitutional argument, hold that the Bankruptcy Rules, as applied to the facts of this case, violate Million's rights under the Due Process Clause of the Fifth Amendment and under Article III, reverse the judgments of the court of appeals and district court, and remand the case to the district court for consideration of the briefs already on file there. In the alternative, this Court should grant the Writ of Certiorari, hold that the court of appeals should have taken up the constitutional argument, reverse the judgment of the court of appeals, and remand the case to the court of appeals with instructions to consider the arguments presented to it.

Respectfully submitted,

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APPENDIX A
CONSTITUTIONAL AND RULES PROVISIONS

UNITED STATES CONSTITUTION:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be compensation deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. V.

TEXAS CONSTITUTION:

> §50. The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and

> conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void. This amendment shall become effective upon its adoption.

TEX. CONST. art. XVI § 50 (1973, subsequently amended November 4, 1997).

TEXAS STATUTES AND CODES:

> §41.001(a) A homestead and one or more lots used for a place of burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.
> (b) Encumbrances may be properly fixed on homestead property for:
> (1) purchase money;
> (2) taxes on the property;
> (3) work and material used in constructing improvements on the property if contracted for in writing as provided by Sections 53.254 (a),

(b), and (c);

(4) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding; or

(5) the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner.

TEX.PROP. CODE ANN. §41.001 (a), (b) (Vernon Supp. 1998)

FEDERAL RULES OF BANKRUPTCY PROCEDURE:

8002(c) **Extension of Time for Appeal.** The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the occurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure

> statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

BANKR.R. 8002 (c).

LOCAL BANKRUPTCY RULES OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS:

L.B.R. 1007.2 MAILING--LIST OR MATRIX

> (b) Mailing Lists--Chapter 11 Twenty Largest Unsecured Creditors List. In chapter 11 reorganization cases, in addition to the list of the twenty largest unsecured creditors required by Bankruptcy Rule 1007(d), two copies of a mailing list of the names and addresses of the twenty largest unsecured creditors in the format prescribed in N.D. TX L.B.R. 1007.2(a) shall be filed with the clerk.

ND TX LBR 1007.2

L.B.R. 2002.1 NOTICE TO CREDITORS & OTHER INTERESTED PARTIES

> (a) Twenty-Day Notices to Parties in Interest.
>
> * * *
>
> (2) Notice of a proposed use, sale, or lease of property other than in the ordinary course of business shall be prepared and served by the proponent of such use, sale, or lease.
>
> (3) Notice of the hearing on approval of a

compromise or settlement of a controversy shall be served by one of the parties proposing the compromise.

* * *

(5) In a chapter 7 liquidation, notice of the hearing on the dismissal or conversion of a case to another chapter shall be served by the clerk. In a chapter 11 reorganization, notice of the hearing on the dismissal or conversion of a case to another chapter shall be served by the movant. When the U.S. trustee is the movant, notice of the hearing on the dismissal or conversion of a chapter 11 case shall be served by the clerk. In a chapter 12 or 13 debt adjustment, notice of the hearing on the dismissal or conversion of a case to another chapter shall be served by the standing trustee.

* * *

(10) Notice of the time fixed for filing proofs of claim in chapter 7 or chapter 12 or 13 cases pursuant to Bankruptcy Rule 3002(c), shall be served by the clerk in chapter 7 cases, and by the standing trustee in chapter 12 and 13 cases, and combined with the notice of commencement of case, meeting of creditors, and fixing dates.

(b) Twenty-Five Day Notices to Parties in Interest. The notices required by Bankruptcy Rule 2002(b) shall be served by the party whose disclosure statement is being considered or by the proponent of the plan, as the case may be.

(c) Notice to Equity Security Holders. Notice of the order for relief and of any meeting of

equity security holders ordered by the court pursuant to S 341 of the Code shall be served by the debtor in possession or trustee in all cases under chapter 11. The notices required by subdivisions (d)(3), (4), (5), (6), and (7) of Bankruptcy Rule 2002 shall be served in accordance with (a)(2), (5), (6) and (b) of this Rule.

(d) Other Notices.

(1) The notices required by subdivisions (f)(1), (3), (4), and (5) of Bankruptcy Rule 2002 shall be served by the party responsible for serving Notice of the S 341 meeting of creditors as provided in subdivision (a)(1) of this Rule.

(2) Notice of the dismissal of a case under chapter 7 or 11 shall be served by the clerk, provided that the debtor in possession shall serve such notice if the order was entered on motion of the debtor in possession. Notice of the dismissal of chapter 12 or 13 case shall be served by the standing trustee.

(4) The notice required by subdivision (f)(7) of Bankruptcy Rule 2002 shall be served by the proponent of the plan.

* * *

(f) Notices to Creditors Whose Claims Are Filed. In a chapter 7 case, after the expiration of time to file a claim under Rule 3002(c), all notices required by subdivision (a) of this rule, except clause (4) thereof, may be mailed only to creditors whose claims have been filed, and

parties who have filed a request for notices with the clerk.

(g) Certificate of Service When Notice Served by Party. When a party other than the clerk is required by this Rule to serve notice, such party shall file a copy of the notice with a certificate of service evidencing the names and addresses of the parties served and the manner of service.

ND TX LBR 2002.1.

L.B.R. 2016.1 COMPENSATION OF PROFESSIONALS

(a) Statement Required by S 329 and Rule 2016(b). In all cases under the Bankruptcy Code, the statement required by S 329 of the Bankruptcy Code and Bankruptcy Rule 2016(b) shall be filed by the attorney for the debtor within 10 days after filing of the case and a copy shall be served on the United States trustee. The standing chapter 12 or 13 trustee shall be served with the disclosure of compensation statement in chapter 12 or 13 cases.

ND TX LBR 2016.1.

L.B.R. 3002.1 FILING PROOF OF CLAIMS OR INTEREST

(a) Filing Proof of Claim. An original proof of claim shall be filed with the clerk. In a case under chapter 12 or chapter 13, a copy of the proof of claim shall be served on the standing trustee by the claimant.

ND TX LBR 3002.1.

L.B.R. 4001.1 AUTOMATIC STAY--RELIEF FROM

(a) Motions; Service. No summons is required. The movant shall file with the clerk a certificate of service attached to the motion, evidencing the mode of service and the names and addresses of the parties served, and a certificate of conference evidencing compliance with District Court Local Civil Rule 7.1(a) and N.D. TX L.B.R. 9014.1(c)(1). The motion shall contain a notice of the requirement of the filing of a response to the motion as set forth in subdivision (b) of this rule. A motion for relief from the automatic stay shall be served on the following parties:

(1) In a chapter 11 case,

(A) The debtor, and, if the debtor is represented by an attorney, to the attorney, and ....

* * *

(2) In a chapter 7, 12, or 13 case,

(A) The debtor, and, if the debtor is represented by an attorney, to the attorney... .

ND TX LBR 4001.1.

APPENDIX B
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
JULIA MILLION,	§	CASE NO. 395-36490-RCM-13
	§	
DEBTOR	§	

FINAL JUDGMENT PER BANKRUPTCY RULE 9021
ON DEBTOR'S MOTION TO VACATE ORDER

For the reasons stated in the Findings of Fact and Conclusions of Law signed this date, it is Ordered as follows:

1. The Order of Dismissal entered April 14, 1997, is vacated and set aside.

2. For cause, under 11 U.S.C. 349(b), and for the reasons stated in the Findings of Fact and Conclusions of Law signed this date, this case is dismissed with this Court's determination herein of the Salas and Slayden claim, as set forth in the Findings of Fact and Conclusions of Law signed this date, for the reasons stated in the Findings of Fact and Conclusions of Law. It is binding on Debtor, notwithstanding the Dismissal Order; Salas and Slayden may attempt to enforce this judgment in State court. This Court does not prejudge or rule on the availability, if any, of any State court remedies such as partition, sale, or other remedy to enforce this judgment. This judgment is intended to liquidate only Claimants' interest in the property,

and is not intended to collaterally estop or bar by *res judicata* any issues with respect to Claimants' enforcement rights with respect to their one-third interests.

3. Salas and Slayden may record this judgment in the Real Property Records of Dallas County, Texas, in order to reflect their interest in the property described as follows:

> Lot 10 in Block G/6991 of Melshire Estates Addition, an addition to the City of Dallas, Texas according to the Map thereof recorded in Volume 33, Page 7, Map Records of Dallas County, Texas and commonly known as 5966 Williamstown, Dallas, Dallas County, Texas.

SIGNED this 17th day of June, 1997.

ORIGINAL SIGNED BY
/s/ Robert C. McGuire
ROBERT C. MCGUIRE,
UNITED STATES BANKRUPTCY JUDGE

APPROVED AS TO FORM:
s/ Rodney R. Elkins
Rodney R. Elkins, Counsel
for Debtor

s/Rosemary Zyne
Rosemary Zyne, Counsel
for Claimants

APPENDIX C
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
JULIA MILLION,	§	CASE NO. 395-36490-RCM-13
	§	
DEBTOR	§	

ORDER ON DEBTOR'S MOTION TO VACATE ORDER

Pursuant to Bankruptcy Rules 9014 and 7052, the following are the Court's Findings of Facts and Conclusions of Law with respect to the Debtor's Motion to Vacate Order heard on May 19, 1997.

1. Debtor filed a voluntary petition pursuant to Chapter 13 of the United States Bankruptcy Code on October 17, 1995. The Petition was amended on November 22, 1995.

2. Nick Salas and Anthony Slayden, her sons, filed claims against the Estate, to which claims Debtor had objected.

3. On February 12, 1997, a hearing was held on Debtor's Objections to the Claims of Salas and Slayden. The Court made extensive Findings of Facts and Conclusions on the record, disposing of the claims and objections. On March 12, 1997, a status conference was held with the Court, the Plaintiff's attorney and the Debtor's then-attorney, and a form of judgment on the claims objection was discussed.

4. On April 11, 1997, Debtor moved to dismiss her Chapter 13 proceeding pursuant to 11 U.S.C. 1307(b) and, on that same date, the Court signed its Order of Dismissal pursuant to 11 U.S.C. §1307(b), finding that the case had not been previously converted under 11 U.S.C. §§706, 1112, or 1208. Such Order was entered on April 14, 1997.

5. Notwithstanding the Order of Dismissal, on April 22, 1997, and not being aware of its prior dismissal order, on April 22, 1997, the Court signed an order purporting to memorialize its Findings of Fact and Conclusions of Law of February 12, 1997, on Debtor's Objections to the Claims of Salas and Slayden.

6. The claims of Salas and Slayden have been subject to at least two State court lawsuits. The first was filed in 1990 by these claimants and was dismissed for want of prosecution. The second suit was apparently filed in 1994. See, Exhibits 2 and 3 to Debtor's Motion to Vacate, and Debtor's Exhibits at trial. Although not raised at the hearing on February 12, 1997, on May 19, 1997, Debtor claimed the benefit of a partial summary judgment in such 1994 suit. However, per Exhibit 3 to Debtor's Motion to Vacate, it appears that such case was allegedly dismissed for want of prosecution and the partial summary judgment was not made final or preserved in the dismissal order. At and prior to the hearing on February 12, 1997, Debtor did not plead, nor orally allege, any reliance on such alleged partial summary judgment.

7. On May 2, 1997, Debtor filed a Motion to Vacate the Court's Order entered April 22, 1997, or Alternative Motion for Rehearing.

8. Pursuant to the ***Querner*** case, 7 F.3rd 1199, 1202 (5th Cir. 1993), in making its rulings, the Court did

consider, among other factors, economy, convenience, fairness and comity. This dispute between the claimants and their mother has been in courts at least three different times. Debtor selected this forum to try her objection to these claims. When she was unsuccessful on her objections, she sought to dismiss her case and put the claimants through another trial elsewhere. Apparently the February 12, 1997 hearing was the only full scale trial the parties have ever had on the underlying issues between them. It would be unfair and uneconomic to the claimants to be forced to go through another full scale trial in State court on liquidation of their claim on the same matter. The facts of this claim have already been tried, and that distinguishes this case from ***Querner.*** Further, the Claimants were delayed in Bankruptcy Court from October, 1995 until February 12, 1997, before the issues between the parties were tried.

9. It appears that the Court has jurisdiction of this matter under Federal Rule of Civil Procedure 59, carried forth in Bankruptcy Rule 9023, and Federal Rule of Civil Procedure 60, carried forth in Bankruptcy Rule 9024, and 11 U.S.C. 349(b).

10. Debtor's Motion to Vacate and alternative Motion for New Trial or Rehearing is overruled, except as noted hereafter. The Order entered on April 22, 1997, was entered within 10 days of the dismissal entered April 14, 1997.

11. With respect to Debtor's Objections to Salas and Slayden's claim heard February 12, 1997, the Court adopts or modifies the following paragraphs of the Order entered April 22, 1997:

a. Debtor is the mother of the Respondents, Nick Vincent Salas and Anthony Michelle Slayden.

b. Respondents are the beneficiaries of a

trust created by the Last Will and Testament of Ada Lee Million, who died on February 29, 1972, in Dallas County.

c. The Will was admitted to probate in 1972.

d. The Will gave one-third of Ada Million's estate to Debtor and two-thirds in trust to Salas and Slayden until the youngest of such two had attained 25 years of age, at which time the trust shall terminate and the Trustee shall distribute all such trust assets unto such two individuals. See Claimant's Exhibit 1.

e. Raymond Story and Republic National Bank were appointed as co-trustee by the Will.

f. Raymond Story was appointed independent executor by the Will.

g. Subsequently, Republic National Bank and Raymond Story refused to accept appointment as co-trustees. After trouble with the initial trustee, Raymond Story, on March 22, 1979, the 160th District Court appointed Debtor successor trustee.

h. Under the terms of the Will, the trust was to terminate and Debtor was to transfer the trust assets and estate to the Respondents when the youngest grandchild had attained the age of 25 years. Respondent, Nick Vincent Salas, is the youngest grandchild, and he attained the age of 25 years on October 27, 1989.

i. Subsequent to that time, the Claimants requested that the Debtor deliver to them a written statement of account and turn over the trust assets to them, and this fight began.

j. Respondents were forced to file suit against the Debtor for a trust accounting, for turnover of the

corpus of this estate, *et cetera*. A copy of the original Petition is one of the exhibits.

k. On December 8, 1992, Respondents and Debtor executed a mediation agreement in settlement of the lawsuit which was pending in the 193rd District Court of Dallas County, Texas.

l. The settlement was not lived up to by either side. The Debtor did not make a good faith effort to sell the property and claimants did not dismiss the State Court suit with prejudice.

m. The trust purchased the property located at 5966 Williamstown Road, Dallas, Texas 75230, hereinafter called "the Property", and described more fully as follows:

> Lot 10 in Block G/6991 of Melshire Estates Addition, an addition to the City of Dallas, Texas according to the Map thereof recorded in Volume 33, Page 7, Map Records of Dallas County, Texas and commonly known as 5966 Williamstown, Dallas, Dallas County, Texas.

It was bought in the name of Judy Salas, as Trustee for her children's trust. See, Statement of Facts, pages 30 and 54. Judy Salas is another name of the Debtor. It was bought March 5, 1987, and Debtor distributed it to herself in 1989. See Exhibits 5 and 6. There is insufficient proof that the Debtor was entitled to distribution of such entire property from the Trust as her justifiable share of the estate of Ada Lee Million. Arguably, Salas and Slayden, as beneficiaries of the Trust, would be entitled to such entire interest of the Trust in the property in question. However, giving Debtor all offsetting credits to which

she would be entitled, Salas and Slayden are each found to own a one-third interest in the Property as Trust Beneficiaries; or, an equitable lien for such one-third interest, less a $25,000.00 offset against each of the respective one-third interests. The Debtor owns the remaining one-third interest.

n. Claimants are entitled to the foregoing relief.

o. The Debtor's offsetting claims are brought on to a large extent by her poor record keeping, necessitating large accounting fees and attorney's fee expenses.

p. The Debtor's accounting is suspect and even the Debtor says it cannot be relied upon in critical areas.

q. The Debtor's machinations with the house (see Claimants' Exhibit 6), make her conduct as Trustee suspect.

r. Under such circumstances, Debtor's claims of further offsets are denied.

SIGNED this 17 day of June, 1997.

ORIGINAL SIGNED BY
/s/ Robert C. McGuire
ROBERT C. MCGUIRE,
UNITED STATES BANKRUPTCY JUDGE

APPROVED AS TO FORM:
s/ Rodney R. Elkins
Rodney R. Elkins, Counsel
for Debtor

s/Rosemary Zyne
Rosemary Zyne, Counsel
for Claimants

ORDER ON DEBTOR'S MOTION TO VACATE ORDER

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
NOV 17 1997
NANCY DOHERTY, CLERK
By_____
Clerk

JULIA MILLION,	§	
	§	
Appellant,	§	
	§	
v.	§	Civil Action No.
	§	3:97-CV-1797-P
NICK VINCENT SALAS and ANTHONY MICHELLE SLAYDEN	§	
	§	
Appellees.	§	
	§	

ORDER OF DISMISSAL

Now before the Court is Appellees' Motion to Dismiss Appeal, filed on August 4, 1997. Appellant filed a Response on August 8, 1997. Appellees filed a Reply on August 15, 1997 and a Supplement on September 12, 1997. Appellees assert that Appellant's notice of appeal was not timely filed and that the Court should, therefore, dismiss Appellant's appeal. For the reasons set forth below, the Court is of the opinion that Appellees' motion to dismiss should be GRANTED.

BACKGROUND

This is an appeal from a bankruptcy proceeding. It is undisputed that the parties agreed on a proposed order and judgment which Appellees' lawyer presented to the Bankruptcy Court on June 17, 1997. On June 18, 1997, the Bankruptcy

Court entered its final judgment in this matter. The current appeal is from this June 18 ruling.

Appellant filed her notice of appeal in the Bankruptcy Court on July 1, 1997. On August 4, 1997, Appellees filed a motion to dismiss appeal, arguing that the notice of appeal was filed one day late, thus depriving the Court of jurisdiction over this matter.

DISCUSSION

Appellees' motion to dismiss raises jurisdictional issues based on the timeliness of Appellant's appeal. The Fifth Circuit has consistently held that a timely notice of appeal is a mandatory and jurisdictional prerequisite which must be satisfied before a court can hear an appal. *See Lacy v. Askanase*, 114 F.3d 556, 557 (5th Cir. 1997); *Barber v. Security Benefit Life Ins. Co.*, 936 F.2d 210, 211 (5th Cir. 1991); *First Nationwide Bank v. Summer House*, 902 F.2d 1197, 1198 (5th Cir. 1990); *Mann v. Lynaugh*, 840 F.2d 1194, 1201 (5th Cir. 1988); *Bond v. Western Auto Supply Co.*, 654 F.2d 302, 303 (5th Cir. 1981); *Sanchez v. Board of Regents of Texas Southern Univ.*, 625 F.2d 521, 522 n.1 (5th Cir. 1980). Thus, the Court must decide if Appellant timely filed her notice of appeal or, in the alternative, if she is entitled to an extension of time to file the notice. If these issues are answered in the negative, the Court does not have jurisdiction and must dismiss the appeal.

The Bankruptcy Rules outline the procedure for filing an appeal and many of these rules are analogous to the Federal

Rules of Appellate Procedure.[1] Specifically, Federal Rule of Bankruptcy Procedure 8002(a) requires that "[t]he notice of appeal shall be filed with the clerk within 10 days from the date of the entry of the judgment, or order, or decree appealed from." In the present appeal, the Bankruptcy Court entered its Order on July 18, 1997. Under the provisions of Rule 8002(a), Appellant should have filed her notice of appeal on July 30, 1997.[2] It is undisputed that Appellant filed her notice of appeal on July 1, 1997, which is one day late under the Bankruptcy Rules. Appellant's notice of appeal was, therefore, untimely filed.[3]

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[1] Because of the similarity between the Bankruptcy Rules and the Federal Rules of Appellate Procedure, the Court is guided by Fifth Circuit precedent construing the deadlines announced in the Federal Rules of Appellate Procedure.

[2] Technically, ten days from the date of the Bankruptcy Court's Order was July 28, 1997, but this date fell on a Saturday. Under Fed.R.Civ.P. 6(a), however, Appellant had until Monday, June 30 to file the notice of appeal.

[3] In her response to the motion to dismiss, Appellant argues that Fed.R.Civ.P. 6(e) allows for three extra days for a party to respond when a notice is served by mail. According to Appellant, since the Clerk for the Bankruptcy Court mailed the Order from which the Appellant is appealing, her time to file her notice should be extended three days and her July 1, 1997 notice of appeal should, therefore, be considered timely. The Court is unconvinced by this argument. Under Fed.R.Civ.P. 77(d), "[l]ack of notice of the entry of the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal withing the time allowed...." Rule 77(d) clearly states that a timely notice of appeal must be filed regardless of a party's knowledge of the entry of an order. This Rule embodies the notion that parties have a

Although Appellant did not file her notice of appeal within the ten day time frame prescribed in Rule 8002(a), she could have requested an extension to file her notice of appeal. Under Rule 8002(c):

> The **bankruptcy judge** may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal **must be made** before the time for filing a notice of appeal has expired, except that a request made **no more than 20 days after the expiration of the time for filing a notice of appeal** may be granted upon a showing of excusable neglect....

Bankruptcy Rule 8002(c) (emphasis added). This Rule is an adaptation of Fed.R.App.P. 4(a)(5). *See* Advisory Committee Note to Bankruptcy Rule 8002. Under the procedure outlined in Rule 8002(c), Appellant could have filed for an extension of time with the Bankruptcy Court before July 21, 1997. At no time, however, has Appellant filed a motion for extension of time. Inappropriately and in response to Appellees' motion for dismiss, Appellant asks this Court for an extension based on excusable neglect. Because this Court is not authorized to determine whether there was excusable neglect for her failure to timely file a notice of appeal and since there has not been a

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duty to keep themselves informed about the status of their pending litigation. *See Latham v. Wells Fargo Bank*, 987 F.2d 1199 (5th Cir. 1993).

timely motion for extension filed in the Bankruptcy Court, Appellant's appeal must be dismissed for lack of jurisdiction. *See, e.g. Lacy,* 114 F.3d at 557 ("Lacy could have requested an extension of time from the district court for good cause...but there is nothing in the record to indicate that he did so. Therefore, we dismiss Lacy's appeal for lack of appellate jurisdiction.").

CONCLUSION

Appellant has failed to file a timely notice of appeal as prescribed by Bankruptcy Rule 8002(a). Further, the time for filing a motion for extension of time under Rule 8002(c) has long since passed. Regardless of the merits of Appellant's appeal, the Court is prohibited on jurisdictional grounds from hearing this appal. Based on the relevant law and applicable authorities, Appellees' Motion to Dismiss is GRANTED.

So Ordered

Signed this 17th day of November, 1997.

s/Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

Certified a true copy of an instrument
on file in my office on 4/1/98
NANCY DOHERTY, Clerk, U.S. District
Court, Northern District of Texas
By s/Carla Johnson Deputy

APPENDIX E
[Excerpts from Million's Brief to the United States Court of Appeals for the Fifth Circuit]

No. 97-11415
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE MATTER OF JULIA MILLION

JULIA MILLION,
Appellant.
v.
NICK VINCENT SALAS and
ANTHONY MICHELLE SLAYDEN,
Appellees,

Appeal from the United States District Court
for the Northern District of Texas

BRIEF FOR APPELLANT, JULIA MILLION

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STATEMENT OF THE ISSUES

ISSUE ONE: Whether the Bankruptcy Clerk failed to comply with the requirements for entry of a judgment, resulting in this appeal being premature.

ISSUE TWO: Whether Bankruptcy Rule 9006(f) adds three days to that period within which a notice of appeal is required by the rules to be filed.

ISSUE THREE: Whether the Bankruptcy Clerk's failure to mail notice of the entry of the bankruptcy court's judgment and Appellees' counsel's failure to provide Million with a copy of, or a notice of, the signing or entry of the bankruptcy court's judgment, combined with the Bankruptcy Clerk's misrepresentation that the judgment had not been entered, constitutes such exceptional circumstances as to give the District Court jurisdiction over the appeal.

ISSUE FOUR: Whether the Bankruptcy Clerk's failure to mail notice of the entry of the bankruptcy court's judgment and Appellees' counsel's failure to provide Million with a copy of, or a notice of, the signing or entry of the Bankruptcy court's judgment, combined with the Bankruptcy Clerk's misrepresentation that the judgment had not been entered, requires equitable tolling of the time period in which the notice of appeal must be filed, or such other

equitable principles apply, such as to give the District Court jurisdiction over the appeal.

ISSUE FIVE: Whether the Bankruptcy Rules, as structured, to permit the expiration of the time period in which an appeal must be brought, without notice to the aggrieved party, are a violation of the Due Process clause of the United States Constitution, Amendment Article V, and are thus invalid as applied.

ISSUE SIX: Whether the District Court erred in dismissing the appeal for lack of jurisdiction.

APPENDIX F
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 21 1998
CHARLES R. FULBRUGE III,
CLERK

No. 97-11415
Summary Calendar

In the Matter Of: JULIA MILLION,

Debtor.

JULIA MILLION,

Appellant,

versus

NICK VINCENT SALAS;
ANTHONY MICHELLE SLAYDEN,

Appellees.

Appeal from the United States District Court for the
Northern District of Texas, Dallas
USDC No. 3:97-CV-1797-P

Before JOLLY, SMITH, and WIENER, Circuit Judges.
PER CURIAM:*

Appellant Julia Million appeals an order from the district court dismissing her appeal from the bankruptcy court for want

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.R. 47.5.4.

of jurisdiction. The district court held that Million's appeal was untimely under Bankr. R. 8002(a) and therefore it had no jurisdiction to hear the case.

On appeal, Million contends that her notice of appeal was timely because Bankr. R. 9006(f) extends the ten-day period of appeal under Bankr. R. 8002(a) by three days.[1]

Jurisdiction is a question of law that we review de novo. In re Moody, 41 F.3d 1024, 1026 (5th Cir. 1995).

After a review of the record and consideration of the briefs, we must affirm the district court's dismissal of Million's appeal.

In pertinent part, Bankr. R. 8002(a) provides that "the notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." The rule is mandatory and failure to comply deprives the district court of jurisdiction to review the bankruptcy court's judgment. In re Moody, 41 F.3d at 1026 (citing Abraham v. Aguilar (In re Anguilar), 861 F.2d 873, 874 (5th Cir. 1988)). Under Bankr. R. 8002(a) Million had until Monday, June 30,

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[1]Million urges several other arguments on appeal that she failed to present to the district court. Because we are confident that no miscarriage of justice will result, we decline to consider the issues raised for the first time on appeal. Lindsey vs. Federal Deposit Ins. Corp., 960 F.2d 567, 572 (5th Cir. 1992).

1997, to file a timely notice of appeal.[2] It is undisputed that Million did not file her notice of appeal until July 1, 1997. As such, Million's appeal was untimely.

Million's reliance on Bankr. R. 9006(f) is misplaced. Bankruptcy R. 9006(f) provides:

> When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or other paper is served by mail, three days shall be added to the prescribed period.

Notwithstanding its three-day extension period, Bankr R. 9006(f) is "inapplicable to the appeal proceeding proscribed in Rule 8002(a)." Arbuckle vs. First National Bank of Oxford, 988 F.2d 29, 31 (5th Cir. 1993) (citing In re Sanders, 59 B.R. 414, 416 (D. Mont. 1986)). Therefore, to preserve her right to file a timely appeal, Million was required to adhere jurisdictional requirements of Bankr. R. 8002(a). This she failed to do. The district court did not err in dismissing Million's appeal for lack of jurisdiction.

The judgment of the district court is hereby

AFFIRMED.

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[2] The bankruptcy court judgment was entered on June 18, 1997. Because ten days from the date of entry of judgment fell on a Saturday, June 28, 1997, Million had until Monday, June 30, 1997, to file the notice of appeal. Fed.R.Civ.P. 6(a).

Supreme Court, U.S.
FILED
APR 15 1999
CLERK

No. 98-1515

In The

Supreme Court of the United States

October Term, 1998

JULIA MILLION,

Petitioner,

v.

NICK VINCENT SALAS and
ANTHONY MICHELLE SLAYDEN,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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RESONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents, Nick Vincent Salas and Anthony Michelle Slayden, file this Respondents' Brief in Opposition ("Response") to this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"), asking the Court to deny the Petition to review the opinion issued December 21, 1998, by the United States Court of Appeals for the Fifth Circuit. In support of this request, Respondents respectfully show the Court as follows:

STATEMENT OF THE CASE

The Petitioner's statement of the proceedings below is grossly inaccurate as it fails to apprise the Court of crucial facts related to the questions presented to this Court for review.

The first question presented asserts lack of notice to the appealing party of the commencement of the time period for appeal. The Petitioner, however, admitted in the District Court proceeding that notice was given, however, Petitioner omits these facts in her Statement of the Case.

In the District Court proceeding, Petitioner admitted the following facts:

1. On May 28, 1997, the Bankruptcy Court issued its rulings from the bench. Counsel for both parties signed off on the judgment on June 16, 1997. (2 R. at 173).

2. On June 16, 1997, Petitioner's counsel was advised by Respondents' counsel that the judgment was being presented to the Court for signature at docket call on June 17, 1997. (1 R. at 24).

3. The judgment was presented to the Court by Respondents' counsel on June 17, 1997, and the Court forwarded it to the Clerk for entry. (2 R. at 173).

4. The Clerk entered the judgment the following day (June 18, 1997) *and forwarded a copy of the Order to counsel for both parties that same day.* (2 R. at 171).

5. The original of the judgment contains a Certificate of Service on the back, signed by a deputy clerk, certifying that a copy of the judgment was sent to counsel for the Debtor (Petitioner) on the same day the judgment was entered. Petitioner's counsel failed to submit this complete copy of the judgment when he submitted the record on appeal to the District Court. (Appellant's Response to Appellees' Motion to Correct the Record).

6. On July 1, 1997, 14 days after the entry of the judgment, and one day after the time for Notice of Appeal expired, Petitioner's counsel, *for the first time,* made inquiry of the Bankruptcy Clerk and Respondents' counsel regarding the judgment. (1 R. at 25). There is no evidence on the record that Petitioner or her counsel had any contact whatsoever with the Court prior to July 1, 1997.

7. Despite its untimeliness, Petitioner filed a Notice of Appeal on July 1, 1997. (1 R. at 4). In the Notice of appeal, Petitioner admits that the "Order was mailed to counsel by the Clerk's office on the 18th [of June] . . . " In

her response to the Motion to Dismiss in the District Court, Petitioner again admits that the Clerk timely mailed the notice to counsel for both parties. (1 R. at 25)

8. Once Petitioner learned of the entry of the judgment, she still had 19 days to file with the Bankruptcy Court a Motion for Extension of Time to file the Notice of appeal (Bankruptcy Rule 8002(c)), yet she chose not to do so.

All through the appeal in the District Court, Petitioner took the position that notice of the entered judgment was mailed to her by the Clerk on June 18, 1997, (the date the judgment appealed from was entered).

Not until her brief on appeal to the Fifth Circuit Court of Appeals did she change her position and assert that no notice was sent by the Clerk. The Fifth Circuit declined to consider the due process argument now before this Court because Petitioner failed to raise the issue in the District Court and because the Court was confident that no miscarriage of justice would result.

REASONS FOR DENYING THE WRIT

A. The Standards for Review Have Not Been Met by Petitioner.

The Petitioner requests this Court to review an issue which was not raised in the District Court, but instead was raised for the first time in a brief to the Court of Appeals. The Court of Appeals declined to consider the issue since it was not raised in the District Court and

because the Court was confident that no miscarriage of justice would result.

The Court should deny discretionary review in this matter pursuant to Supreme Court Rule 10.1 which states in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Court has held that the principal purpose for which the Court uses certiorari jurisdiction is to resolve conflicts among the circuit courts of appeal and state courts on the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). Petitioner's failure to satisfy this standard should necessarily result in the Court's denial of her Petition.

B. Notice Was Given and Therefore the Issue is Moot.

Question One:

Petitioner alleges that Bankruptcy Rule 8002(c) is unconstitutional because it denies due process because the appeal was denied because no notice of the commencement of the time required to appeal was given to the appealing party.

First, as shown in Respondents' Statement of Facts, notice was given of the commencement of the time period.

The Bankruptcy Clerk certified that a copy of the judgment was mailed to Petitioner's counsel on the date the judgment was entered. Furthermore, Petitioner, in her untimely Notice of Appeal to the District Court, admits that notice was mailed by the Clerk and she again admits this in her Response to the Motion to Dismiss the Appeal. Thus, there was no lack of notice and thus no denial of due process.

Second, Petitioner admits that she was given notice that the judgment was being presented to the Bankruptcy Judge for signature on June 17, 1997. In her brief to the court of appeals, Petitioner admits that her counsel was

aware of the timing and procedure of entry of an Order once signed. Thus, there was no lack of notice and thus no denial of due process.

Third, Bankruptcy Rule 8002 contains two safety components to further ensure due process:

1. A Notice of Appeal could be filed after the announcement of the decision but before the entry of the judgment and still be treated as filed after the entry of the decision and on the date thereof. Bankr. Rule 8002(a).

2. A request to extend the time for filing a Notice of Appeal could be made within twenty days after the expiration of the time for filing a Notice of Appeal, upon a showing of excusable neglect. Bankr. Rule 8002(c).

The Petitioner could have exercised either one of these options to safeguard her right to appeal, but she chose not to exercise either.

The cases cited by the Petitioner regarding lack of notice as a denial of due process are not on point. There were only two parties to the bankruptcy proceedings in issue, Petitioner and Respondents. Both parties were fully aware of the proceedings, actively participated therein, actively participated in the preparation of the form of the Final Judgment, and each was sent notice of the entry of the judgment.

In the cases cited by Petitioner, the parties who were denied due process were peripheral parties, not actively involved in the proceedings, and, in most cases, not even aware that any proceedings were pending. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950). The one notable exception, the

main case upon which Petitioner relies, is *City of New York v. New York, New Haven*, 344 U.S. 293, 97 L.Ed. 333 (1953). In that case, statutory "reasonable notice" was required and this Court held that notice by publication in newspapers of a claims bar date was not "reasonable notice" even though the creditor had actual knowledge of the bankruptcy. In the case at hand, however, the Petitioner had an overwhelming amount of notice. The Petitioner was aware of the Court's ruling, her counsel approved the form of the judgment, she was aware that the judgment was being presented to the Court on a date certain, she was aware that the entry of the Order routinely took place within a day or two of the signing of the Order, and she was sent notice of the entry of the judgment on the day it was entered. She also clearly had actual notice of the entry of the Order in time to request of the Bankruptcy Court an extension of time to file the Notice of Appeal. Therefore, Petitioner clearly had notice and no denial of due process occurred.

Question Two:

The Petitioner asserts that the constitutional issue of denial of due process was not raised until the District Court dismissed the appeal. The issue, however, was ripe when the Motion to Dismiss the appeal was filed. The issue of denial of due process, however, was not raised in the District Court because during those proceedings Petitioner admitted that the Clerk actually mailed a copy of the entered judgment to counsel for Petitioner on the date the judgment was entered.

In fact, the issue of denial of due process was not even raised as an issue in the Statement of Issues on

Appeal to the Court of Appeals. Instead, the issue was raised for the first time in the brief to the Court of Appeals. It was in the Court of Appeals brief that Petitioner for the very first time alleged that no notice was sent by the Clerk of the entry of the judgment (a dramatic change from Petitioner's District Court allegation that notice was sent by the Clerk but not received).

As Petitioner asserts in her brief, this Court has held in *Hormel v. Helvering*, 312 U.S. 552, 85 L.Ed. 1037, 61 S.Ct. 719 (1941), that:

> Ordinarily, an appellate court does not give consideration to issues not raised below . . . [P]arties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant; . . . it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

The argument of lack of due process due to lack of notice was brought into issue for the first time in the Court of Appeals. Prior to that time, notice was admitted.

The raising of the issue for the first time in the brief on appeal to the Court of Appeals deprived Respondents of the opportunity to introduce evidence of the Clerk's notice. In fact, after the issue was raised in the brief, Respondents attempted to obtain a stipulation by Petitioner of the Clerk's Certificate of Service affixed to the back of the judgment, but Petitioner refused to stipulate. Respondents filed a Motion to Correct the Record to

include the back of the judgment containing the Certificate of Service as part of the judgment. In response thereto, Petitioner admitted that the Certificate of Mailing was affixed to the judgment but objected to the correction of the record, stating that the Certificate of Mailing was "evidentiary", and since not offered to the District Court as evidence, it should not be offered to the Court of Appeals.

The raising of the issue for the first time in Petitioner's brief to the Court of Appeals denied Respondents the opportunity to offer all the evidence they believed relevant and thus would have prejudiced Respondents' case.

CONCLUSION

For these reasons, the Court should deny the Petition for Writ of Certiorari.

There is no constitutional issue to be decided in this case because Petitioner had notice and more than ample opportunity to be heard but failed to timely avail herself of this opportunity. In addition, the Court of Appeals properly declined to take up the constitutional argument because it was not raised in the District Court, thus depriving Respondents an opportunity to present evidence thereon, and because there was no miscarriage of justice by declining to do so. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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